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State v. Downing Appellant's Reply Brief Dckt. 44382

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	
	)	
vs.	)	Supreme Court No. 44382
	)	
JASON SCOTT DOWNING,	)	
	)	
Defendant-Appellant.	)	
	)	

APPELLANT'S REPLY

Appeal from the District Court of the Fourth Judicial District
Of the State of Idaho, in and for the County of Ada
The Honorable Gerald Schroeder, Presiding.

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INTRODUCTION

In its responsive briefing, the State sets forth four arguments in opposition to Mr. Downing's appeal. Each argument fails, however, and Mr. Downing's appeal is appropriately granted.

First, the State argues that the District Court correctly expanded the applicability of *Michigan v. Summers*, 452 U.S. 692 (1981), to third parties swept up in warrantless probation searches. The State's argument fails because *Summers* is limited to those subject to warrant-based searches, and the cases applying its rationale to third parties swept up in warrantless probation searches did so under highly limited and distinguishable factual circumstances.

Second, the State argues that Officer Holtry's frisk of Mr. Downing was justified on officer safety grounds, but the situation was well and truly under control and presented no safety concerns when Officer Holtry frisked Mr. Downing.

Third, the State argues that the District Court's factual finding that Mr. Downing consented to Officer Holtry's search of his pocket was not clearly erroneous, but the weight of the evidence demonstrates that Mr. Downing did not so consent.

Lastly, the State argues that, assuming *arguendo* that all three searches were illegal, the inevitable discovery doctrine inoculates the frisk of Mr. Downing. Such application of the inevitable discovery doctrine, however, stretches it past its breaking point and is not justified under these factual circumstances.

It should also be noted that after the probation officers unlawfully detained Mr. Downing, every subsequent search or questioning of Mr. Downing by law enforcement is appropriately suppressed as the fruit of the poisonous tree.

ARGUMENT

A. *Michigan v. Summers is Inapplicable.*

The State first argues that the District Court correctly expanded the applicability of *Michigan v. Summers*, 452 U.S. 692 (1981), to third parties swept up in warrantless probation searches. (*Brief of Respondent* ("Resp. Br."), 6-14.)

As a threshold matter, the State recognizes that *Summers* is limited in its applicability because it ruled only that the owner of a home subject to a search warrant may be lawfully detained during the pendancy of such warrant-based search. (*Resp. Br.*, 7-8.)

The State argues, however, based on *People v. Matelski*, a California Court of Appeals case, that the applicability of *Summers* should be expanded to justify the detention of those in the position of Mr. Downing, namely third parties swept up in a warrantless probation search of a premises. (*Resp. Br.*, 9-10.) *Matelski*, however, to the extent the Court finds it persuasive, is readily distinguishable from the facts of this case and does not support the State's argument for expansion of *Summers*.

In *Matelski*, officers went to the home of a probationer, Michael Mitchell, to conduct a warrantless probation search. 82 Cal. App. 4th 837, 841 (Cal. Ct. App. 2000). The search was conducted specifically because Mr. Mitchell "flunked a drug test." *Id.* at 851, 853. At the door, the officers noticed Matelski leaving the home. *Id.* The officers told Matelski to "come over here" and promptly explained that the conditions of Mr. Mitchell's probation "prevented him from associating with persons who were convicted felons." *Id.* The officers then asked for identifying information to determine "if they were convicted felons." *Id.* at 841-42. Matelski had an outstanding warrant and was arrested. *Id.* at 842.

Matelski moved to suppress, arguing that he was not engaged in any criminal activity when he was detained. *Id.* Significantly, the state did not argue that Matelski was subject to detention simply because he was present at the location where the warrantless probation search occurred; rather, the state argued that "it was reasonable to detain defendants to determine if they were convicted felons because, if they were, the parolee would have been in violation of his parole conditions in associating with them." *Id.* Thus, Matelski was detained for the specific, articulated reason of determining if his mere presence constituted a parole violation on the part of the party subject to the warrantless probation search.

As the State does in this case, the state in *Matelski* based its argument on *Summers*. Differentiating *Summers*, the *Matelski* court noted that a "significant factor in evaluating the character of the intrusion is that it was pursuant to a search warrant, i.e., a neutral magistrate had concluded that there was probable cause to believe that the law was being violated in the house." *Id.* at 847. The *Matelski* court, appropriately following *Summers'* limited holding, ruled that "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 848.

The *Matelski* court, recognizing that the applicability of *Summers* did not extend to third parties swept up in warrantless probation searches, relied on two California state cases, *People v. Glaser*, 11 Cal. 4th 354 (Cal. 1995), and *People v. Hannah*, 51 Cal. App. 4th 1335 (Cal. Ct. App. 1996), to articulate the test applicable in such circumstances:

> We balance the extent of the intrusion against the government interests justifying it, looking in the final and dispositive portion of the analysis to the individualized and objective facts that made those interests applicable in the circumstances of the particular detention.

Id. at 849 (emphasis added).

The *Matelski* court concluded that the detention was brief, no more than "15 minutes," and not public *Id.* at 850. Of great significance was the fact that the detention served individualized and articulated government interests: "there was a need to determine defendants' connection to the probation because the probationer was prohibited by his general terms of probation from consorting with convicted felons." *Id.* Elaborating, the court noted that "[a]lthough there was some intrusion on the privacy interests of the Matelskis as a result of the probation search here, we find that such intrusion was minimal and not unreasonable in the light of the officer's duty to ascertain if Mr. Mitchell was violating the terms of his probation." *Id.* at 853.

The State reads *Matelski* far too broadly in arguing that the "*Matelski* Court agreed that *Summers* would apply to probation searches." (*Resp. Br.*, 9.) *Matelski* reaches no such broad conclusion. Rather, *Matelski* weighed the invasion of privacy of the third party against the articulated government interest of determining whether the third party's mere presence constituted a violation of the probationer's terms.

The facts of this case clearly indicate that, unlike *Matelski*, there existed no articulated, individualized reason to detain Mr. Downing. The record is wholly devoid of any indication that Mr. Downing's status, whether as a felon or otherwise, was investigated and relevant to the terms of Mr. Cook's probation. Rather, the officers in this case detained Mr. Downing solely for the reason that he happened to be located on the premises of a home subject to a random, warrantless probation search. Such non-existent basis for detention clearly fails to satisfy the governmental interest requirement set forth in *Matelski*.

Furthermore, a recent California case interpreting *Matelski* bolsters Mr. Downing's position. In *People v. Morrison*, 2014 WL 4249930 (Cal. Ct. App. 2014), probation officers

conducted a random probation compliance search of a probationer's home. *Id.* at *1. Morrison was exiting the home with the probationer and was detained as part of the search. *Id.* Morrison informed the officers that heroin found in the house was hers, and later moved to suppress on unlawful detention grounds. *Id.*

The *Morrison* court granted the suppression motion, ruling the detention unlawful. *Id.* at *6. Of great significance was the fact that, unlike the search in *Matelski*, the search was purely random; it was not the result of an articulable suspicion of a probation violation:

> Here, there is nothing in the record to suggest that the officers, in conducting a "probation compliance search," were acting on facts that might give rise to a suspicion that Stugard was in violation of probation. Insofar as the record reveals, the police, in the language utilized in *Matelski*, were "acting randomly."

Id. at *5.

In this case, as in *Morrison*, the record evidence demonstrates that the search of Mr. Cook's home was purely random, a routine probation compliance check. There is no evidence that the probation officers in this case were, as in *Matelski*, checking on Mr. Cook for a specific reason such as a failed drug test. Indeed, the "purpose of the visit was a resident verification", a strikingly benign purpose. (Tr., p. 59, L. 21-22; p. 43, L. 16-18.) That Mr. Downing was detained incident to a purely random probation compliance search further undermines the State's reliance on *Matelski's* rationale to extend *Summers*.

The State may attempt to pivot and argue that two other government interests justified Mr. Downing's detention as part of a random home verification visit. First, the State may argue that even if the purpose of the visit to Mr. Cook's residence was a random home verification visit, the officers discovered criminal activity afoot justifying Mr. Downing's detention. The facts, however, fatally undermine such argument. Officer Hurst had Mr. Cook sit on the couch immediately upon entering Mr. Cook's home. (Tr., p. 44, L. 11-15.) Though Mr. Cook began

acting erratically at some point in time, any number of reasons could have caused Mr. Cook to so behave, and there is no indication in the record of Mr. Downing acting erratically, or even uncooperatively, at any juncture. Furthermore, it is undisputed that Mr. Downing was denied permission to leave the residence by Officer Hurst before any paraphernalia was located. (Tr., p. 11, L. 3-p. 12, L. 12.) Thus, when Mr. Downing was denied permission to leave Mr. Cook's residence, there was zero articulable, individualized suspicion with regards to any criminal conduct on the part of Mr. Downing.

Second, the State may argue the Mr. Downing's detention was justified solely on officer safety grounds, but this argument likewise has no merit. The record demonstrates that Mr. Downing was supremely cooperative with the probation officers, allowing them entry to the house. (Tr., p. 44, L. 16-19.) When the probation officers entered the residence Mr. Cook greeted them and was likewise cooperative: "Mr. Cook was actually behind the couch, and he popped up and, said, hi, so we had him come and sit down." (Tr., p. 44, L. 13-15.) At some point in time Mr. Cook became agitated, but he was easily restrained with handcuffs and he obeyed commands to sit, quickly mooting safety concerns:

> Q: What was Mr. Cook doing when you placed him in restraints?
>
> A: He was, I believe, sitting on a chair, rocking back and forth and looked nervous and a little agitated.

(Tr., p. 46, L. 5-8.) It was at this point in time, with Mr. Cook restrained and at most "nervous" and a "little agitated," that Mr. Downing stood up and requested to leave, which permission was denied by the probation officers. (Tr., p. 11, L. 1-11.) At the time the probation officers denied Mr. Downing permission to leave, the record demonstrates zero officer safety concerns justifying Mr. Downing's continued detention.

In summary, Idaho law has not extended *Summers* in the manner applied by the District Court, and the Court should decline the State's invitation to do so. To the extent the Court places persuasive weight on *Matelski*, that case does not stand for the blanket proposition that any third party who happens to be present during a warrantless probation search may be detained. Rather, *Matelski* requires a case by case balancing of the invasion of a third party's privacy against the government's interest at issue. In this case, Mr. Downing's privacy was arbitrarily and capriciously invaded, and such invasion furthered no government interest. The search of Mr. Cook's house was wholly random and not based on any individualized, articulable suspicion of criminal activity. The government made no inquiry as to whether Mr. Downing's mere presence was a violation of Mr. Cook's probation as was the case in *Matelski*. At the time the probation officers denied Mr. Downing permission to leave, there was no suspicion of criminal activity on the part of Mr. Downing, nor were there reasonable officer safety concerns.

B. *No Officer Safety Concerns Justified Officer Holtry's Frisk of Mr. Downing.*

The State argues that the District Court correctly found that officer safety concerns justified Officer Holtry's frisk of Mr. Downing. (*Resp. Br.*, 14-18.) The factual circumstances, however, did not present officer safety concerns justifying Officer Holtry's frisk of Mr. Downing.

The State emphasizes that when Officer Holtry arrived on the scene, the probationer Mr. Cook was "curled up into a little fetal position" and was "sobbing and pretty emotional." (*Resp. Br.*, 16; Tr., p. 27, L. 6-10.) The State, however, ignores the highly critical and undisputed fact that Mr. Cook was handcuffed. (Tr., p. 27, L. 6.) Indeed, probation officer Hurst described Mr. Cook as only being "nervous and a little agitated" after he was placed in handcuffs. (Tr., p. 46, L.

7-8.) It is patently unreasonable that Mr. Cook, in handcuffs, agitated, and a bit nervous, posed a safety threat to Officer Holtry and justified a search of Mr. Downing.

Nor is there a shred of evidence in the record that either Mr. Downing or the third occupant of the house posed a safety risk. Probation officers Hurst and Severson undoubtedly would have restrained either Mr. Downing or the other occupant had they believed their safety was threatened. Indeed, the record demonstrates that both men were cooperative at every turn, sitting on the couch as directed and obeying commands not to leave Mr. Cook's residence. There is no record evidence that Mr. Downing or the other man acted in a threatening manner at any juncture. As the State's trial counsel summarized, "Mr. Downing was exceptionally cooperative during this entire contact. He consented to the officers coming into that house. He consented to sitting on the couch." (Tr., p. 51, L. 14-17.)

If the frisk of Mr. Downing under these circumstances was reasonable in light of officer safety concerns, it is difficult to imagine any frisk being deemed unreasonable. Any prohibition against officer safety frisks would be rendered an effective nullity. It also bears repeating that the frisk occurred after Mr. Downing was unlawfully detained, thereby rendering the frisk, legal or not, properly suppressed as the fruit of the poisonous tree.

C. *Officer Holtry Removed the Package from Mr. Downing's Pocket Without Consent.*

The State argues that the District Court's factual finding that Mr. Downing consented to the removal of the package from his pocket by Officer Holtry was not clearly erroneous. (*Resp. Br.*, 18-20.) The State cites Officer Holtry's testimony with no further corroboration, and then dismisses Mr. Downing's argument because he only "point[s] to Downing's contrary testimony that Officer Holtry began pulling the object out before Downing consented to the search." (*Resp.*

Br., 20.) Mr. Downing testified that Officer Holtry had already reached in his pocket before Mr. Downing consented to the search. (Tr., p. 16, L. 13-p.17, L. 9.)

The State's argument fails for two reasons. First, Officer Holtry's version of events is wholly uncorroborated, and Mr. Downing's version of events is likelier in light of Officer Holtry's testimony. Officer Holtry testified that, based on his external manipulation of the item in Mr. Downing's pocket, he suspected it was methamphetamine. (Tr,. p. 38, L. 3-18.) It is reasonable to presume that Officer Holtry, suspecting the nature of the substance, reached into Mr. Downing's pocket to retrieve the object prior to receiving permission to do so, even if he was asking for such permission simultaneously. Furthermore, Officer Holtry expressed that he had safety concerns at this juncture, giving him more reason, in his mind, to prematurely remove the item from Mr. Downing's pocket.

Secondly, and most significantly, Officer Holtry's removal of the object from Mr. Downing's pocket occurred after Mr. Downing was unlawfully detained, thereby rendering the search, legal consented to or not, properly suppressed as the fruit of the poisonous tree.

D. ***The Inevitable Discovery Rule does not Inoculate the Prior Unlawful Searches.***

The State's final argument is that the inevitable discovery rule renders the entirety of the unlawful searches and questioning of Mr. Downing in this case moot because Mr. Downing was arrested for frequenting, and the methamphetamine on his person would have been discovered pursuant to a lawful search incident to his frequenting arrest. (*Resp. Br.*, 21-22.)

The State, however, strains the inevitable discovery rule into fantastic hindsight and well beyond its breaking point. It is well-established that the exclusionary rule is the judicial remedy for addressing illegal searches and bars the admission or use of evidence gathered pursuant to the illegal search. *See Stuart v. State*, 136 Idaho 490, 496, 36 P.3d 1278, 1284 (2001). An exception

to the exclusionary rule is the inevitable discovery doctrine. *Id.* The inevitable discovery doctrine applies when a preponderance of the evidence demonstrates that the information would have inevitably been discovered by lawful methods. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *State v. Gibson*, 141 Idaho 277, 286 n. 4, 108 P.3d 424, 433 n. 4 (Ct. App. 2005).

The State contends that because Mr. Downing, after being read his *Miranda* rights, admitted to Officer Holtry that he had used illegal substances in Mr. Cook's house that day, Mr. Downing's arrest and search incident thereto were inevitable. (*Resp. Br.*, 21-22.) This argument, however, wholly ignores the unlawful nature of Mr. Downing's detention *ab initio*. Had Mr. Downing not been unlawfully detained when he attempted to leave Mr. Cook's residence, he would not have been subjected to questioning by Officer Holtry, Mirandized or otherwise.

The inevitable discovery rule cannot presume away the initial unlawful detention of Mr. Downing by the probation officers. "The underlying rationale of the inevitable discovery doctrine is that a preponderance of the evidence proves that some action that actually took place, or was in the process of taking place, would have led to the discovery of the evidence that was already obtained through unlawful police action." *State v. Bunting*, 142 Idaho 908, 916, 136 P.3d 379, 387 (Ct. App. 2006).

Stated differently, the fruit of an unlawful search is only saved by the inevitable discovery rule if the evidence demonstrates that some lawful action took place which would have led to the discovery of the evidence in question. The inevitable discovery doctrine was not intended to allow a court to consider what actions the authorities should or could have taken and in doing so then determine that lawful discovery of already unlawfully obtained evidence would have been inevitable. *See United States v. Reilly*, 224 F.3d 986, 995 (9th Cir. 2000); *State v. Holman*, 109 Idaho 382, 392, 707 P.2d 493, 503 (1985).

The State is asking the Court to ignore an unlawful detention and presume a lawful detention which did not exist. In this case there was no simultaneous, independently lawful detention of Mr. Downing pursuant to which Officer Holtry questioned Mr. Downing. Officer Holtry was able to question Mr. Downing only because Mr. Downing was unlawfully detained. The State cannot conjure a hypothetical in which Mr. Downing was lawfully detained for some other reason and then deem discovery inevitable.

Indeed, in *Holman*, the state argued an officer's unlawful seizure of a vehicle did not taint the evidence of the vehicle's identification. The state reasoned that the inevitable discovery doctrine applied because the police could have seized the truck lawfully and, had they done so, the identification of the truck would have been inevitable. The Idaho Supreme Court dismissed this argument, stating the inevitable discovery doctrine was never intended to swallow the exclusionary rule wholly by substituting what the police should have done for what they really did. *Holman*, 109 Idaho at 392, 707 P.2d at 503.

The State advances precisely this rejected argument, taking the position that Mr. Downing could have been searched pursuant to a lawful detention, when in actuality Mr. Downing was searched only because he was unlawfully detained. As much as it might desire to do so, the State cannot change the facts to its liking *ex post*. The State's inevitable discovery argument is unavailing and appropriately rejected.

CONCLUSION

For the reasons stated herein, Mr. Downing's appeal is appropriately granted and the case remanded.

Respectfully submitted this 28th day of June, 2017.

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Attorney for Defendant-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2017, I served a true and correct copy of the foregoing *Appellant's Reply* in the manner indicated below:

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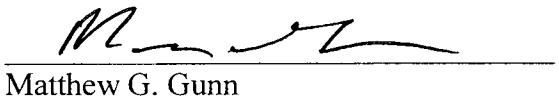

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